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No. 97-1536

Supreme Court, U.S.
FILED

APR 18 1998

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In The
Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,

Petitioner,

vs.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

*On Petition for Writ of Certiorari to the
Arizona Court of Appeals, Division One*

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the imposition of a state transaction privilege (sales) tax on road construction activity located entirely on Indian reservations pre-empted by federal law when the road construction is financed and regulated by the Bureau of Indian Affairs, and the State provides no services or regulatory activities in connection with the activities being taxed?

STATEMENT PURSUANT TO RULE 29.6

Respondent Blaze Construction Company, Inc. certifies that it does not have a parent company and does not have any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

In 1980, this Court said that all courts must examine the federal, tribal and state interests at stake to determine if the assertion of State authority violates federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 184 (1989); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982). The Arizona Court of Appeals correctly applied the analysis mandated by this Court and ruled that petitioner's taxation of respondent's road construction projects on Indian reservations was pre-empted by federal law.

The Court should reject petitioner's request for a writ of certiorari. Petitioner's position is based on a mischaracterization of the ruling of the Court in *Cotton Petroleum*. Instead of relying on the decisions of the Court, petitioner relies on a decision by a state court that misinterpreted the law, and a Ninth Circuit decision that is logically flawed.

Petitioner ignores the federal and tribal interests at stake and advances the position that states are free to tax activity on Indian reservations even if a state does not regulate or have any interest in that activity. The record does not contain any evidence that petitioner has any regulatory interest or provides any services related to respondent's construction activities. Appendix to Petition for Certiorari (hereinafter "App.") 18. The court of appeals noted an important consideration for determining the strength of petitioner's interest: A state's interest is the strongest when there is a regulatory interest that justifies the tax. App. 18-24. Thus, the lower court properly applied the pre-emption analysis of this Court.

The Arizona Court of Appeals disagrees with a decision by the New Mexico Supreme Court. The Arizona Court of Appeals,

however, correctly pointed out the errors made by the New Mexico court. The decision by the Arizona court fosters certainty in this area of law because it reiterates the doctrinal foundations that this Court established in *White Mountain, Ramah*, and *Cotton Petroleum*.

A. Factual Background

Respondent is a 100% Indian-owned company that is incorporated under the laws of the Blackfeet Tribe.¹ Respondent works on construction projects exclusively on Indian reservations. Respondent entered into nineteen contracts with the Bureau of Indian Affairs (BIA) to build rural roads on the Navajo, Hopi, Fort Apache, Colorado River, Papago (Tohono O'odham) and San Carlos Apache Indian reservations. The roads are located in extremely remote regions and primarily serve local Native American settlements. The record shows that many of these roads were intended to provide access to residential areas.

Petitioner did not provide any services to respondent for these construction projects. Petitioner played no role in the planning or development of the projects, and it did not issue any permits to respondent. Petitioner did not issue any licenses or certificates to respondent. Petitioner did not provide any employment, or quality or safety inspection services for these projects. Finally, petitioner did not appropriate any funds for general road construction during the term of the tax assessment. In fact, one witness in this case testified that he was not aware

1. Respondent concedes that for purposes of pre-emption analysis it stands in the same position as a non-Indian. See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 160-61 (1980). The fact that respondent is a Blackfeet corporation is, however, relevant to compliance with the provisions of the Buy Indian Act, 25 U.S.C. § 47.

of petitioner providing any maintenance of tribal roads within the past twenty-five years.²

The federal government regulated the construction of the roads set forth in the nineteen contracts. The tribes work closely with the BIA to set construction priorities for the BIA. The BIA relies on these tribal priorities when it selects the roads for construction contracts.

The BIA has a limited amount of funds available for road construction and improvement projects. The BIA specifications require contractors that bid on road projects to include all federal, state and local taxes in a bid. Thus, if a state imposes a 5% tax on a contractor, that translates into 5% fewer roads being built under the contract. See generally Reply Brief at 3 (quoting Transcript of Hearing before Arizona Dept. of Revenue).

After opening the bidding process on a road construction project, the BIA cannot give preferential treatment to reservation-based Indians. The Buy Indian Act requires that the bidding be opened to all Indian-owned companies on an equal basis. The Indian Self-Determination Act gives either a tribe or the BIA

2. The petition for certiorari contains a factual error. Petitioner cites as a "fact" that it spends \$100,000,000 on schools. Petition at 4. Petitioner did not present this alleged "fact" to the superior court as a statement of fact for the cross-motions for summary judgment. When petitioner made this assertion at the appellate level, respondent objected to it. See Reply Brief at 1. The assertion set forth in the petition could not be considered by an Arizona appellate court as a matter of law. See *West v. Baker*, 510 P.2d 731, 734-35 (Ariz. 1973) (refusing to consider document attached to appellate brief); *Nelson v. Nelson*, 791 P.2d 661, 664 (Ariz. Ct. App. 1990) (refusing to consider affidavit filed after entry of summary judgment). Since this factual statement could not be considered by the Arizona Court of Appeals, this Court should not consider it to be part of the factual record in this matter.

the authority to enter into road construction projects such as the ones at issue in this case. The BIA provides oversight for the road projects as part of its trust responsibilities to Indian tribes.

B. Proceedings Below

The Arizona Board of Tax Appeals issued a unanimous decision on July 18, 1994 and held that the "competing federal, state and tribal interest at stake in this case compel preemption of Arizona's transaction privilege tax." Petitioner appealed this decision by filing a complaint in Maricopa County Superior Court. The trial court ruled on cross-motions for summary judgment in November, 1995. The superior court judge held that *Department of Revenue v. Hane Construction Co.*, 564 P.2d 932 (Ariz. Ct. App. 1977), was dispositive and overruled the decision by the Board of Tax Appeals.

Respondent appealed the judgment to the Arizona Court of Appeals. The appellate court overruled *Hane Construction* because its was not premised on the implied pre-emption analysis mandated by this Court. App. 11, 25-26. The court of appeals concluded that the various federal statutes governing respondent's construction projects constituted a comprehensive federal regulatory scheme. App. 15-16, 24. The court also held that petitioner failed to establish any regulatory interest in the road construction projects and cited the reasoning of this Court in *White Mountain Apache Tribe* and *Ramah*. See generally App. 17-18. The court of appeals also noted that in *Cotton Petroleum* this Court distinguished its conclusions in *White Mountain Apache Tribe* and *Ramah* because the record before it showed state regulation of oil wells. *Id.*

REASONS FOR DENYING THE WRIT

The United States Supreme Court has never abandoned the implied pre-emption analysis set forth in cases such as *White Mountain Apache Tribe* and *Ramah*. In *Cotton Petroleum*, the Court applied the same analysis, but upheld the imposition of a state tax because the state regulated oil wells. Petitioner is trying to create confusion in this area of law by misinterpreting this Court's rejection of a commerce clause argument made by the corporation in *Cotton Petroleum*. The decision by the court of appeals correctly pointed out the unwavering approach followed by this Court. The court of appeals rejected the analysis of the New Mexico Supreme Court and identified problems with the language employed in some decisions of the Ninth Circuit Court of Appeals because those decisions did not follow *White Mountain Apache Tribe*, *Ramah* and *Cotton Petroleum*.

I.

THE CONFLICT BETWEEN THE ARIZONA COURT OF APPEALS AND THE NEW MEXICO SUPREME COURT IS NOT A REASON TO GRANT CERTIORARI BECAUSE THE COURT BELOW CORRECTLY DECIDED THIS CASE.

Petitioner contends that the Court should grant a writ because the decision below purportedly conflicts with opinions from the Ninth Circuit and conflicts with a decision by the New Mexico Supreme Court. The court of appeals decision is consistent with Ninth Circuit law. In *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 435 (9th Cir. 1994), and *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 660 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990), the circuit court pointed out that when analyzing the strength of the state's interest, state regulation of the on-reservation activity is critical. The Ninth

Circuit invalidated the California tax on timber cutting in *Hoopa Valley* because California "plays no role in the Hoopa Valley Tribe's timber activities." 881 F.2d at 66

In *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996), the Ninth Circuit used this Court's pre-emption analysis. The record in *Gila River* showed State involvement in the on-reservation activities at issue. The Gila River tribe developed Compton Terrace (a concert venue) and Firebird International Raceway for various events. The State provided law enforcement services for concerts and races at state expense. The Arizona Highway Patrol and the Department of Transportation provided traffic control services for the various events. The State exercised concurrent jurisdiction over liquor sales, and provided a legal forum for civil and criminal cases. 91 F.3d at 1238-39. The Ninth Circuit held that these on-reservation activities constituted an interest that "justifies taxing the beneficiaries of those services." *Id.* at 1239. Thus, the court held that a state tax on the sale of tickets and concession items was not pre-empted by federal law.³

The analysis employed by the Arizona Court of Appeals here is consistent with the implied pre-emption analysis employed by the Ninth Circuit in *Waddell*, *Cabazon* and *Hoopa Valley*. The Arizona Court of Appeals evaluated whether there

3. Judge O'Scannlain wrote the opinions in both *Waddell* and *Cabazon*. In *Cabazon*, Judge O'Scannlain noted the importance of a regulatory interest in on-reservation activities to determine the strength of a state's interest. When Judge O'Scannlain later wrote the *Waddell* decision, he did not overrule his prior decision or reject his analytical framework. Reading the *Cabazon* and *Waddell* decisions together, this Court should conclude that in the Ninth Circuit a regulatory interest is still an important factor when evaluating the strength of the state's interest. This conclusion is consistent with the opinion of the Arizona Court of Appeals in this case.

was a comprehensive regulatory scheme, App. 15-16, decided if the tax adversely affected the interests of the Tribe, App. 16, and determined the strength of petitioner's interest. App. 16-24. The length of the court of appeals' decision was due to the need to respond to the erroneous argument of petitioner and not because the court allegedly gave undue weight to any particular factor. *See generally* App. 16-24.

Respondent concedes that the decision below conflicts with the decision of the New Mexico Supreme Court in *Blaze Construction v. Taxation and Revenue Dept.*, 884 P.2d 803 (N.M. 1994). The conflict between the Arizona and New Mexico courts, however, is not a reason to accept the petition here because the Arizona Court of Appeals correctly decided the case.⁴

II.

THE COURT OF APPEALS APPLIED THE PROPER ANALYSIS AND REACHED THE CORRECT RESULT IN THIS CASE.

The Arizona Court of Appeals properly decided two legal issues germane to the petition. First, the court concluded that the privilege tax that petitioner wants to impose on respondent

4. In *Ramah*, this Court said,

Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future.

458 U.S. at 846. Unfortunately, the New Mexico courts have not heeded the scolding by this Court and still do not follow the letter and spirit of Indian pre-emption law.

is subject to pre-emption analysis. Second, the lower court said that whether a state regulates on-reservation activity is a relevant factor when weighing the state's interest in the three-part pre-emption test.

A. Implied Pre-emption Analysis Applies in this Case

For the past eighteen years, petitioner has been presenting the same arguments to the courts in this country regarding whether implied pre-emption analysis applies to its taxes. Petitioner contends that the Arizona Court of Appeals erred because the contract was between respondent and the Bureau of Indian Affairs regarding road construction on reservations. Petition at 15. The Court should deny petitioner's writ because it is based on an argument the Court has already rejected.

In *White Mountain Apache Tribe*, the Court rejected the idea that there was a difference between imposition of the taxes for commercial activity on roads maintained by the tribe and those maintained by the Bureau of Indian Affairs. 448 U.S. at 149 n.14. The Court said,

For purposes of federal preemption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs.

Id.

The Court continued to follow this approach in *Cotton Petroleum* when it noted that the roads in *White Mountain* were " 'built, maintained and policed exclusively by the Federal Government, the Tribe, and its contractors.' " *Cotton Petroleum*, 490 U.S. at 184 (quoting *White Mountain Apache Tribe*, 448

U.S. at 150). This Court has never created an exception to its pre-emption analysis depending on whether a contractor is contracting with an Indian tribe or the BIA. No such distinction is appropriate because the BIA enters into contracts pursuant to its trust obligations, App. 8, and after input from tribal road committees on the work that should be done. Reply Brief at 4 (quoting Transcript of Hearing before Arizona Dept. of Revenue).

Petitioner asks this Court to adopt a mechanical approach to the pre-emption issue. Petitioner believes that if there is any contract between the BIA and a non-Indian, pre-emption analysis does not apply. This may be the rule for cases that involve activity off of a reservation, *United States v. New Mexico*, 455 U.S. 720 (1982), but it does not hold true for on-reservation contracts. When a state asserts authority over contractors on tribal lands, the courts do not apply a "mechanical or absolute" concept of sovereignty. *White Mountain Apache Tribe*, 448 U.S. at 145. State assertions of authority for on-reservation activities are pre-empted if they interfere with federal law or tribal interests. Thus, the Arizona Court of Appeals properly concluded that it should employ the implied pre-emption test. App. 5-9.

B. The Decision Below Correctly Analyzed the Federal and Tribal Interests

The only "bright-line" rule that applies to pre-emption issues is when a state attempts to tax a tribe or tribal members, the tax is invalid. *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S. Ct. 2214, 2220 (1995). If, however, a state imposes a tax on non-tribal members for activity that occurs on an Indian reservation, there is no mechanical rule. A court must balance the federal, state and tribal interests. *See Ramah*, 458 U.S. at 837 ("no definitive formula for resolving the issue of whether States may exercise authority "over tribal members or reservation

activities"); *White Mountain Apache Tribe*, 448 U.S. at 145 (no "mechanical or absolute conceptions of state or tribal sovereignty").

Moreover, the Court has already rejected petitioner's argument that a state is free to tax non-Indians engaging in commerce on a reservation. Petition at 10. In *White Mountain Apache Tribe*, the Court said that a state cannot "assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary." 448 U.S. at 150-51; *see also Ramah*, 458 U.S. at 843. Thus, the court of appeals' decision is correct on this point of law.

The first interest that the Arizona Court of Appeals analyzed in its decision was the federal interest in road construction on reservations. App. 15-16. The Secretary of the Interior adopted "detailed regulations governing the roads developed by the [BIA]." *White Mountain Apache Tribe*, 448 U.S. at 147-48; App. 15. The federal government provides the funding for the administration and maintenance of the roads. *White Mountain Apache Tribe*, 448 U.S. at 148. The BIA adopted regulations governing all aspects of contracting, 48 C.F.R. Part 1; construction and improvement, 25 C.F.R. § 170.3; approval of location and design, 25 C.F.R. § 170.4; selection of projects, 25 C.F.R. § 170.4(a); maintenance of roadways, 25 C.F.R. § 170.6; use of roads, 25 C.F.R. § 170.8; and policing of roads, 25 C.F.R. Part 11. During construction, the BIA provides day-to-day supervision of all aspects of the construction project. The court of appeals followed this Court and held that the regulations pertaining to the construction of roads on Indian reservations constitute a pervasive regulatory scheme. App. 15-16.

The taxes petitioner seeks to impose also affect the interests of the various Indian tribes and interfere with the BIA

regulations. The Self-Determination Act regulations provide that the BIA is to "leave to Indian tribes the initiative in making requests for contracts and to regard self-determination as including the decision of an Indian tribe not to request contracts." 25 C.F.R. § 271.4(d). The Secretary adopted this regulation so that tribes are not put in any better or worse position if they decide to enter into their own contracts or choose to allow the BIA to contract on their behalf for construction of roads.

Petitioner's privilege tax directly infringes on tribal sovereignty. The construction of roads is an integral part of the role of a federal, state or tribal government to provide for the health, safety and welfare of its citizens. Here, a tribal committee set priorities for road construction projects. *See generally* Reply Brief at 4 (quoting Transcript of Hearing before Arizona Dept. of Revenue). The BIA then implements the projects. If a tribe enters into a contract itself, petitioner concedes that it cannot impose the privilege tax on the contractor. If, however, the tribe makes the governmental decision to allow the BIA to enter into contracts on its behalf, petitioner contends that it can tax the contractor for the same work.

Under petitioner's pre-emption theory, however, tribes that utilize the BIA for road construction projects are penalized because they get fewer miles of roads than tribes who obtain the same money from a grant and contract with a company like respondent. The tax petitioner seeks to impose has to be included in a bid submitted to the BIA. Reply Brief at 3 (quoting Transcript of Hearing before Arizona Dept. of Revenue). The BIA pays the tax from the money appropriated for road construction. Consequently, the 5% tax means that the BIA builds 5% fewer miles of road. *Id.* Petitioner's privilege tax impedes the federal and tribal interests in constructing the most roads for the members of Indian tribes. *See Ramah*, 458 U.S.

at 842 (tax on the contractor "impedes the clearly expressed federal interest in promoting the 'quality and quantity' of educational opportunities for Indians by depleting the funds available for the construction of Indian schools"). In other words, an Indian tribe cannot act independently if it wants to build the most roads for its members. Petitioner's tax is contrary to the comprehensive federal scheme favoring Indian self-determination.

C. The Arizona Court of Appeals Properly Analyzed the Strength of Petitioner's Interest

Petitioner's interests are in stark contrast to the comprehensive federal regulations of roads on Indian reservations and the tribal interests. If petitioner's only interest is simply to raise revenue, that interest does not outweigh the significant federal interests and is, therefore, pre-empted by federal law. *Ramah*, 458 U.S. at 839, 845 (when the only incident is the "general desire to raise revenue," the State's interest is "insufficient to justify the State's intrusion into a sphere so heavily regulated by the Federal Government"); *White Mountain Apache Tribe*, 448 U.S. at 148-50 (Arizona "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation"). This Court has never deviated from this principle.

The Arizona Court of Appeals pointed out that petitioner did not make any claim that it was regulating or providing any services related to the road construction projects at issue. App. 18. The court of appeals rejected the argument that general state services were sufficient to justify this specific tax. *Id.* at 18-19. Petitioner argues that the Court should accept the writ because the Arizona Court of Appeals wrongly concluded that there had to be some connection between a tax and on-reservation

conduct. Petitioner further contends that it "does not have to justify a tax with a showing of specific state services. . . ." Petition at 13. This Court should reject the writ because the argument by petitioner is wrong.

In *Ramah*, the Court found the New Mexico's tax pre-empted New Mexico's tax on a construction project and said, "[T]he State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying for this tax." 458 U.S. at 843. The State also did not assert any regulatory interest to justify the imposition of its gross receipts tax. *Id.* at 844; see also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983) ("The State has failed to 'identify any regulatory function or service that would justify' the assertion of concurrent regulatory authority."). The Court prohibited New Mexico from imposing any additional burden on the comprehensive, educational regulatory scheme intended to provide education to Indian children. *Ramah*, 458 U.S. at 843.

The Court also rejected the argument by New Mexico that general services provided by the State to the Ramah Navajo Indians justified the imposition of the gross receipts tax. 458 U.S. at 845 n.10. The Court rejected this argument because there was no evidence that "these benefits are in any way related to the construction of schools on Indian land." *Id.* (emphasis added).

The Court's decision in *Cotton Petroleum* followed this same analysis, but concluded that the tax was not pre-empted by federal law because the facts were different from those in *Ramah* and *White Mountain Apache Tribe*. The Court noted that in *White Mountain Apache Tribe* and *Ramah*, "both cases involved complete abdication or noninvolvement of the State in the on-reservation activity." 490 U.S. at 185. In *White*

Mountain Apache Tribe, there was no regulatory function or service that justified the imposition of the tax. 490 U.S. at 184. The Court pointed out that in *Ramah*, there was "no legitimate regulatory interests that might justify the tax." 490 U.S. at 184. This Court did not reject the reasoning of *Ramah* and *White Mountain Apache Tribe* in *Cotton Petroleum*.

Instead, the Court applied the same analysis, but upheld the tax because New Mexico regulated the corporation's oil wells. New Mexico regulated the spacing and mechanical integrity of the wells on the reservation. 490 U.S. at 185-86. The federal regulations of the mineral extraction activities were not exclusive. *Id.* at 186. Moreover, New Mexico provided to Cotton Petroleum \$89,384 in services for its on-reservation business. Rather than a complete abdication of oil and gas activities, New Mexico was involved in the regulation of Cotton Petroleum's business activities and not just the collection of tax revenues. *Id.* at 185-86. The Court said,

We thus conclude that federal law, even when given the most generous construction, does not preempt New Mexico's oil and gas severance taxes. This is not a case *in which the State has had nothing to do with the on-reservation activity, save tax it.*

490 U.S. at 186 (emphasis added).

Petitioner and the New Mexico Supreme Court misinterpreted this Court's remarks in *Cotton Petroleum* regarding a proportional tax. In *Cotton Petroleum*, the company objected to the regulatory activity and argued that the taxes were excessive given the governmental benefits bestowed on it. 490 U.S. at 185. Cotton Petroleum tried to interject into federal pre-emption law the requirement that a state tax be proportional to the state regulatory activity or the benefits

provided by the State to the taxpayer. Cotton Petroleum made a bad argument and this Court rejected it.

The Court said that taxes do not have to be proportional to a regulation or the State's interest in the on-reservation activity. The Court did not abandon the importance of a regulatory function or State interest in the on-reservation activity. 490 U.S. at 186 ("this is not a case in which the State has nothing to do with the on-reservation activity"). The Court merely said that if there is a regulation or a State interest, the amount of money the State spends on regulatory activity or assistance does not have to be equal to or in proportion to the amount of taxes. 490 U.S. at 185.

The Court rejected Cotton Petroleum's argument just as it had in previous cases in which taxpayers claimed that their tax burden was outweighed by the governmental benefits that they received. *See generally Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-22 (1937) (rejecting due process challenge to tax); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-23 (1981) (rejecting due process challenge to taxes). This Court cited *Carmichael* for the proposition that a valid tax did not have to be proportional to a benefit. Indian pre-emption law, however, addresses the more fundamental issue of whether a state can impose any tax. A state can only impose a valid tax if the federal and tribal interests do not outweigh the interests of a state. If a state is permitted by federal law to impose a tax, then it is irrelevant whether the tax is proportional to the benefits provided by the State. *See Salt River Pima-Maricopa Indian Comm. v. State*, 50 F.3d 734, 737-38 (9th Cir. 1995) (finding that state's interest outweighed federal interests and then rejecting contention that tribe entitled to receive proportional share of tax receipts), *cert. denied*, 116 S. Ct. 198 (1995); App. 19 (*Salt River* rejected the view that to collect the taxes the value of the services was proportional to the taxes).

This Court has never strayed from its decisions in *White Mountain* and *Ramah* in which state taxation of non-Indians working on tribal lands were invalid because there was a tax, but no state regulation of the on-reservation activity. The one bright-line rule that comes out of *White Mountain*, *Ramah* and *Cotton Petroleum* is that when there is no state regulation or involvement in the on-reservation activity, then the tax is invalid. Thus, the decision by the Arizona Court of Appeals was correct. The decisions by the New Mexico Supreme Court in *Blaze Construction* and the Ninth Circuit in *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1239 (9th Cir. 1996), are simply wrong.⁵ The Supreme Court should reject the writ because the Arizona Court of Appeals correctly decided the case.

5. In *Waddell*, the Ninth Circuit applied the correct pre-emption analysis, 91 F.3d at 1238-39, but went on to say that there does not have to be a "direct connection" between state tax revenues and the services provided to a tribe. *Id.* at 1239. The Ninth Circuit's language was unnecessary because the court found that the state's interest outweighed the federal interests. While there may not need to be a "direct connection" between the tax and the regulation, (e.g., the tax revenue funds just the state regulatory agency), this Court has never said that a state is free to tax on-reservation activity if there is no regulation of the on-reservation activity. To the extent that the Ninth Circuit's decision in *Waddell* disagrees with this proposition, it is wrong.

CONCLUSION

Petitioner is trying to tax an essential tribal and federal governmental function — the construction of roads. Petitioner is trying to "push the envelope" regarding its taxing authority over activity on Indian reservations. The record shows that petitioner provides no services, regulatory function or financial assistance to the road construction activity being taxed, yet petitioner is attempting to tax the activity. Given petitioner's total abdication of responsibility and its disparate treatment of Indian communities in the area of funding for local road construction, what legitimate interest is being served by the tax at issue? The answer is none.

The construction of community roads is an essential, local governmental function, and is a function performed by the various Indian tribes and the Bureau of Indian Affairs. Petitioner's tax on this activity certainly burdens the tribal and federal interests at stake. Under well-established case law from this Court, state taxes of on-reservation construction activities are pre-empted by principles of Federal Indian law when a state has no interest in the activity being taxed.

For the foregoing reasons, Respondent Blaze Construction Company requests that the United States Supreme Court deny the petition for writ of certiorari.

Respectfully submitted,

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